



Housing Finance Company (K) Ltd v Kimeriah (Suing in her capacity as the Administrator of the Estate of harrisson Charles Kimeriah - Deceased) (Civil Appeal E061 of 2024) [2025] KECA 1215 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1215 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E061 OF 2024
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
JULY 4, 2025**

BETWEEN

HOUSING FINANCE COMPANY (K) LTD APPELLANT

AND

FAITH WANJIRU KIMERIAH (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF HARRISSON CHARLES KIMERIAH - DECEASED) RESPONDENT

(Being an appeal from the judgement of the High Court at Nairobi (JWW Mong'are, J.), delivered on 30th November 2023 in Civil Suit No. 250 of 2008)

JUDGMENT

1. In the proceedings before the High Court from which this appeal arises, the respondent, as plaintiff, instituted a suit in her capacity as the administrator of the estate of Harrison Charles Kimeriah (deceased) by a plaint dated 12th May, 2008 which was amended on 16th January, 2017. Initially the suit was against the appellant, as the 1st defendant and one John Karungai Nyamu as the 2nd defendant. The suit against the 2nd defendant was, however, compromised on 26th April 2013 by a consent order in which the respondent agreed to receive the sum of Kshs 40,000,000 from the 2nd defendant. Consequently, the respondent amended the plaint and introduced a new relief against the appellant for Kshs 150,000,000 based on the current value of the suit property together with developments thereon.
2. In the amended plaint, the respondent sought the following reliefs:
 - a. A declaration that the deceased had fully repaid the loan amount advanced by the appellant and any amount being demanded by the appellant from the respondent was not due and or payable under the subject contract;



- b. A declaration that the purported charge over the suit property was null and void;
 - c. General damages for breach of contract for illegally, irregular transfer of L.R. No. 7793/6 to a third party;
 - d. Kshs. 150,000,000/= (One Hundred and Fifty Million) as value of the suit property together with developments thereon; and
 - e. Costs of this suit plus interest.
3. On 1st July, 2008, the appellant filed a defence to the suit denying the averments contained in the plaint and prayed that the suit be dismissed with costs. The matter then proceeded to full hearing during which the respondent called five (5) witnesses and the appellant called two (2) witnesses.
 4. The respondent's case, as presented by herself, as PW1, was that she was the widow of the deceased and that both herself and the deceased were jointly registered as owners of L.R. No. 7793/6 (hereinafter referred to as the suit property); that pursuant to an order issued in HCCC No. 873 of 1993 she was declared by the court as 50% owner of the suit property; that the deceased approached the appellant for a loan whose terms were contained in the letter of offer dated 8th July 1980; that they executed the charge instrument which offered the title to the suit property as security for the loan of Kshs.500,000/= advanced to the deceased by the appellant; that the loan was to be insured, for which the deceased contributed Kshs.451.25/= as premium for the insurance cover that was to be issued by a company that was to be sourced by the appellant; that the premiums were deducted monthly and charged to the deceased as part of his loan repayment; and that in the event of death, the loan balance would be fully redeemed by the insurance and the charged property discharged.
 5. It was PW1's evidence: that contrary to the terms of the letter of offer, the appellant arbitrarily and without notice to the deceased, varied the rate of interest, hence increasing the monthly repayments; that despite her husband having repaid the loan and interest in the sum of Kshs.1,115,181.45 as at 1994, the appellant still demanded to be paid Kshs.9,026,099.60/=; that as a result, the deceased filed Nairobi HCCC No. 693 of 1982 against the appellant, challenging the amount demanded but died during the pendency of the said suit; and that her attempts to be joined as a party to the said suit proved futile.
 6. Upon the death of the deceased, PW1 testified, she visited the appellant and gave her new postal address as Post Office Box No. 72331-00200 Nairobi to one Mr. Geoffrey Kimaita, an employee of the appellant, for purposes of all future communication; that she received no communication from the appellant, but was forcefully evicted from the suit premises by hired goons in the company of police officers and the 2nd defendant who claimed to be the registered owner of the premises.
 7. The respondent further stated: that she was shocked to learn that the property had been sold by the appellant by way of a private treaty for Kshs.10,000,000/= on 25th July, 2006; that even as at the time of the purported sale, the suit property had a market valuation of Kshs.37,000,000/=; that the sale of the suit property was unlawful since she was not served with the requisite statutory notices before the sale, as the one dated 26th January 2006 sent to the estate of the late Harrison Charles Kimeriah was not received by her; and that the current value of the suit property together with all the developments thereon was Kshs.150,000,000.
 8. PW1 urged the court to declare that the loan of Kshs.500,000 had been fully repaid and that the purported sale was an illegality. She urged the court to award her the sum of Kshs.150,000,000/= in damages and as compensation for the illegal sale of the suit property and the developments thereon.



9. Moses Kago, an accountant by profession, testified as PW2. He said that he had been hired by the respondent and the deceased to recalculate the loan repayment. From the records availed to him, he confirmed that the loan had been repaid by 1995. He noted that the interest rate was varied several times and not maintained at 10.5% as indicated in the letter of offer letter, or at 12% as indicated in the charge instrument. His recalculation revealed that the interest applied was as high as 26%. He could not however, confirm if notices of variation of the interest were ever served on the deceased or at all as agreed in the charge instrument.
10. Eunice Nyawira Kimeriah, the respondent's daughter and a banker by profession, testified as PW3. She largely corroborated PW1's testimony and stated that there was no contest over the validity of the charge instrument. She further confirmed that the statutory notice dated 26th January 2006 was never received, even though she had accompanied her mother, the respondent, to the appellant's offices to provide the postal address and confirm the status of the loan following the death of her father.
11. Jane Miriti, a valuer at Capital Valuers testifying as PW4, stated that in October, 2007 the market value of the suit property together with the developments thereon was Kshs.37,000,000, and in 2010 it had risen to Kshs.69,000,000. She produced her valuation report as evidence before court.
12. Paul Kaguamba, a valuer at Assets & Mortgages Valuers, testified as PW5. He testified that in 2007, the market value of the suit property was Kshs.60,000,000 and in 2019 it had risen to Kshs.200,000,000. He further testified that looking at the appellant's valuation of the suit property in 2007, the suit property was grossly undervalued. He produced his valuation report as evidence in court.
13. DW1, Samuel Odiembo, a valuer, stated that as per his valuation report dated 2nd May 2006, the market value of the suit property was Kshs.10,000,000. In his valuation, he relied on a sale on L.R. No. 7793/9 measuring approximately 10 acres which was not far from the suit property and was sold at Kshs.18,000,000 in 2004, one acre retailing at Kshs.1,800,000. In cross examination, he stated that PW5's valuation was based on values at Karen area, whereas the suit property is situated in Langata, an area neighbouring Karen.
14. Simon Osok, an officer of the appellant, testified as DW2.

According to him, a loan of Kshs.500,000 was advanced to the deceased, and the said loan was fully insured but the insurance would only cover the sums upon death of the debtor if the loan account was not in arrears. He confirmed that, based on the statements, the life insurance premium was indeed debited to the loan account by the appellant, and insisted that a policy was taken to secure the loan. He stated that the deceased started defaulting in his loan repayments in October 1980, and that notices on variation of interest were issued to the deceased from time to time. According to him, a statutory notice was sent to the respondent before the suit property was sold and there was a certificate of posting which showed the addresses used. He confirmed that the deceased, through a consent, proposed to pay the outstanding sums by way of monthly instalments while the respondent committed to pay Kshs.9,000,000/= in 2001. In cross examination, he confirmed that the charge instrument required the appellant to charge the deceased interest annually, but the appellant was computing it monthly.
15. In her judgement, the learned Judge identified the issues for determination as:
 - i. Whether the court had jurisdiction to hear and determine the dispute;
 - ii. Whether there was a valid life insurance cover in place equivalent to the loan advanced to the deceased;
 - iii. Whether the appellant served the respondent with all the requisite statutory notices before selling the suit property by private treaty;



- iv. Whether the respondent was entitled to the reliefs sought.
16. On the issue of jurisdiction, the learned Judge relied on this Court's decision in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR and held that since the dispute between the parties touched on settlement of the sums owed to the appellant by the respondent on account of a contractual relationship, and the exercise of the appellant's statutory power of sale as a result of breach of the said contractual relationship, the High court, as opposed to the Environment and Land Court, had the requisite jurisdiction to determine the dispute. Regarding the issue of whether there was a valid life insurance cover in place commensurate to the loan advanced to the deceased, it was found that the appellant was tasked with the duty of ensuring that the deceased had a mortgage protection cover upon payment of the premiums by the deceased; that the appellant never produced a copy of the insurance policy that was taken over the life of the deceased, thus the appellant's defence that the insurance would only cover the sums upon the death of a party if the account was not in arrears and the borrower paid the same had no probative value; that the appellant did not demonstrate how the insurance premiums, deducted from the deceased's account, were utilized, and to which insurance company they were paid; that upon the passing of the deceased, the appellant did not demonstrate that it made a claim for payment of the balance of the loan amount and the insurance company declined to make payments on grounds that there were unpaid dues as at the time of the death of the deceased or any other reason whatsoever; and therefore, the learned Judge concluded that the appellant had not procured the mortgage protection cover in respect of the advanced sum, despite the appellant having diligently collected the premium therefor.
17. Regarding the issue whether the appellant served the respondent with all the requisite statutory notices before selling the suit property by private treaty, the learned Judge found, based on the evidence presented, that no statutory notices were served before the sale of the property. On the issue of the reliefs, the learned Judge found, consequent to the above findings, that the respondent had proved her case against the appellant on a balance of probability, and was entitled to the reliefs sought in the plaint. Judgement was therefore entered in favour of the respondent against the appellant in the following terms:
- i. A declaration that the deceased had fully repaid the loan amount advanced by the appellant;
 - ii. The appellant do pay to the respondent the sum of Kshs.150,000,000/= being the current market value of the suit property together with developments thereon.
 - iii. Costs of this suit;
 - iv. Interest on (ii) &(iii) above from the date of the judgment till payment in full.
18. Dissatisfied with the judgement, the appellant filed this appeal on the grounds that the learned Judge erred: in finding that the appellant did not serve upon the respondent the statutory notice prior to exercising its right of sale under the subject charge; in finding without evidence that the appellant deducted insurance premium from the deceased's account but failed to remit the same to the insurer in terms of the loan conditions between the parties; and that in so finding failed to appreciate that the deceased defaulted in his loan repayment; in awarding the respondent the sum of Kshs 150,000,000 which was not anchored upon any valuation report, and failed to appreciate that an award of damages should be based on the value of the property at the time of the sale and not on the date of the trial; in awarding the respondent the sum of Kshs 150,000,000 without taking into account a sum of Kshs 40,000,000 paid to the respondent by the 2nd defendant; in failing to take into account that there was a debt owing at the time of the sale, the said debt having been admitted in Nairobi HCCC No. 693 of 1982-*Housing Finance Company Kenya Limited v Harrison Charles Kimeriah*; in failing to find



that the admission by the respondent's accountant that he had applied the wrong interest rates in recalculating the subject loan account rendered the report and the evidence of the said accountant worthless; that the entire decision goes against the weight of evidence and was not anchored either on the facts or the law; and in awarding the respondent judgement as prayed for in the plaint without setting out the reason for the award of Kshs 150,000,000 as opposed to quantum set out in the various valuation reports produced in evidence.

19. The appellant prayed that the appeal be allowed, the judgement be set aside, and the suit be dismissed with costs.
20. We heard the appeal on the Court's virtual platform on 18th March 2025 when learned counsel, Mr Chacha Odera appeared with Mr. Paul Kimara for the appellant, while learned counsel, Mr Gichuki Kingara appeared for the respondent. Both parties relied on their written submissions which were briefly highlighted by learned counsel.
21. The appellant in its submissions set out the background of the suit and contended that it was not disputed that the deceased failed, on numerous occasions, to service the facility, and that vide his letter dated 21st February 1993, the deceased conceded that he had not been servicing the facility, hence was in arrears; that the deceased's failure to service the facility constituted breach of the loan terms; that through various notices, the appellant requested the deceased to service the facility, failing which it would exercise its statutory power of sale; and that despite the deceased's protracted breaches beyond 2000, the appellant still accommodated the deceased by suspending legal actions against him, with the expectation that the deceased would redeem the facility.
22. However, it was further submitted: that the failure to service the facility prompted the appellant to commence enforcement proceedings against the deceased in Nairobi HCCC No. 693 of 1982 seeking possession of the charged property; that in his response, the deceased, in an affidavit sworn on 11th March 1986, admitted to having failed to service the facility, and by a decree issued on 6th March 1986, the court ordered the deceased to deliver to the appellant possession of the suit property; that to frustrate enforcement of the decree, the deceased and the respondent filed several applications and suits, and in light of the said endless applications and suits, the appellant and the deceased reached a compromise through a consent dated 23rd March 2000 in HCCC No. 693 of 1982, but the deceased failed to comply with the terms of the consent for over seven months and instead commenced proceedings in Nairobi HCCC No. 649 of 2001 seeking to prevent the appellant from enforcing the consent order; that the said suit abated upon the deceased's demise; that as a result, the appellant, as permitted under the consent order, lawfully exercised its statutory power of sale by selling the suit property to John Karungai Nyamu; that it was against that background that the respondent initiated fresh proceedings before the trial court against the appellant and the 2nd defendant; that on 26th April 2013, the respondent compromised the suit against the 2nd defendant through a court order by which the respondent agreed to receive Kshs 40,000,000 and the 2nd defendant was struck off from the suit.
23. It is therefore submitted on behalf of the appellant: that the record confirms that the statutory notice was served and receipt thereof acknowledged; that in arriving at the decision that there was no evidence that the statutory notice was served, the learned Judge overlooked crucial evidence, including the respondent's response to the notice and, based on this Court's decision in *Ngaira v Chengóli* [2022] KECA 80 (KLR), arrived at an erroneous conclusion; that the learned Judge amended the agreement between the parties by placing an obligation on the appellant to visit the premises prior to the sale, contrary to the decision of this Court in *Kenya Breweries Limited v Kiambu General Transport Agency Limited* [2009] 2 EA and *National Bank of Kenya v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503; that courts have no business amending agreements between parties; that in finding that the appellant



- diligently collected the premium and that the facility was repaid in excess of Kshs 1,000,000, the learned Judge overlooked the crucial evidence on record, particularly the admissions by the deceased, the respondent and PW2 that the account was consistently in arrears and hence, on the authority of *John Okoth Waudi v National Bank of Kenya* [2006] KLR cited with approval in *Housing Finance Company Limited v Mary Wambui Muturi* [2018] eKLR, and *Photo Production v Securicor Ltd* [1980] AC 827, failed to consider material evidence on record.
24. It was further submitted: that the learned Judge failed to appreciate that the deceased had consented to the sale of the suit property in HCCC No. 693 of 1982 in the event of his failure to comply with the agreed strict timelines stipulated in the consent; that the exercise of the statutory power of sale was in accordance with the consent order; and that the learned Judge therefore misdirected herself by failing to evaluate the evidence on record and arrived at a decision that amounted to a punishment to the appellant for complying with the terms of the consent order.
25. According to the appellant, the award of Kshs 150,000,000 was not only arbitrary but also incongruent with the evidence on record. It was submitted that no reason was given by the learned Judge for this award, yet the valuations and the evidence on record did not bring out that figure. In support of the submissions on the justification for this Court to interfere with the said award, the appellant relied on *Butt v Khan* [1981] KLR 349 and *National Social Security Fund v Grace Kazungu & Another* [2018] eKLR. The appellant further contended that the said award was contrary to the established principle that damages ought to be based on the value of the property at the time of the sale and not at the time of the trial, in line with the decision in *Jimmy Nuru Angwenyi v Development Bank of Kenya Limited* [2020] eKLR. It was further submitted that the learned Judge erred in not taking into account the sum of Kshs 40,000,000 paid to the respondent by the 2nd defendant upon the compromise of the suit against the 2nd defendant. According to the appellant, the claim of Kshs 150,000,000 after receipt of the said sum of Kshs 40,000,000 amounted to double compensation.
26. On behalf of the respondent, it was submitted: that based on the authority of the cases of *Michael Gitere & Another v Kenya Commercial Bank Limited* [2018] eKLR, *Stephen Boro Gititha v Nicholas Gatoto & 2 Others* [2017] eKLR, *Nyagilo Ochieng & Another v Fanuel B. Ochieng & 2 Others* [1996] eKLR and *Elizabeth Wambui Njuguna v Housing Finance Co. of Kenya Ltd* [2006] eKLR, in the absence of proof of service of the statutory notice, the learned Judge could not tell if the notice, which was addressed to the wrong address, was served; that it was the appellant's responsibility and duty to ensure that the borrower was insured from the time the advance was made to the deceased or at least 8 months later, whichever came first; that from the bank accounts, it was clear that the bank debited the borrower's account with the insurance premiums, and the borrower paid the premiums from 1980 to 2000; and that the appellant proceeded to illegally and in breach of the contractual agreement between itself and the deceased to capitalise on the same on a monthly basis disguised as other charges, instead of the agreed annual rate, but did not apply for the mortgage protection cover with any insurance company.
27. Further submissions were: that the appellant breached the contract by varying the interest and penalty rates, thereby clogging the deceased's right of redemption, citing the decision in *Richard Kiema Mutiso v United Nations Sacco Ltd & Another* [2016] eKLR in which such an issue was found to establish a prima facie case; that on the authority of the cases of *Mary Wambui v Housing Finance Company Limited* [2012] eKLR, *Emray Enterprises v National Bank of Kenya Ltd* [2019] eKLR, *Anne N. Parmena v Housing Finance Company of Kenya Ltd* [2015] eKLR and *Francis Joseph Kamau Ichatha v Housing Finance Company Limited* [2014] eKLR, the appellant was negligent and in breach of its duty of care by failing to remit the premiums despite availability of funds.



28. On damages, it was submitted that section 99(4) of the *Land Act*, 2012 provides for damages against a person exercising the power of sale where it is found to be unauthorised, improper or irregular, and that the award in this case was fair and was supported by the evidence and in line with the decision in *Nancy Kahoya Amadiva v Expert Credit Limited & Another* [2015] eKLR; that in *Criticos v National Bank of Kenya Ltd* [2022] KECA 541 this Court overturned the trial court’s judgement and awarded the appellant damages of Kshs 2,284,101,00 for the unauthorised, improper and irregular sale assessed at the market value of the property with interest; that since the appellant and the 2nd defendant were independently liable to the respondent, the appellant cannot seek to have the Kshs 40,000,000 paid to the respondent by the 2nd defendant deducted from the amount due from the appellant; and that the learned Judge’s decision was anchored in law.
29. We have considered the record, the grounds on which the appeal is anchored, the rival submissions and the applicable law. This being a first appeal, we are under a duty to subject the entire evidence and the judgement to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and make an allowance for the same. We have also to remember that it is a not a simple thing to overturn the findings of a trial court which had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation of the demeanour of witnesses.
30. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record, or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in rule 31(1) (a) of the Rules of this Court as read with section 78 of the *Civil Procedure Act*, which require a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the superior courts, among them *Selle v Associated Motor Boat Co.* [1968] EA 123, and *Peters v Sunday Post Limited* [1958] EA 424.
31. Having carefully considered the record placed before us, the impugned judgement, the written and oral submissions of learned counsel for the appellant and for the respondents, the cited authorities and the law, we settle the following as the main issues that commend themselves to us for determination, namely: (i) whether the deceased defaulted in servicing the facility; (ii) whether the statutory power of sale had accrued; (iii) whether the sale of the suit property was lawful; (iv) whether the appellant breached the terms of the contract between it and the deceased by failing to insure the suit property; and, (v) whether the award of Kshs 150,000,000 to the respondent was justified.
32. On the first issue, that is, whether the deceased defaulted in servicing the facility that had been extended to him by the appellant, it is apparent that the appellant moved the court in HCCC No. 693 of 1982 – *Housing Finance Company Limited v Harrison Charles Kimeria* seeking possession of the suit property, based on the deceased’s default in making the agreed repayments. In an affidavit sworn by the deceased in the said suit on 11th May 1982, he stated:

That the contents of the plaint which I found in my office on 3rd May, 1982 are true and correct, save that I have not deliberately defaulted payment of the contractual amount.

That my default in payment of the amount in question has been unintentional and brought about by the prevailing economic situation in the country, which in turn so seriously and adversely affected the business firm, Westlands Quality Butchery, a limited liability company, which was the beneficiary on the loan in question that it eventually totally collapsed without



making any repayments leaving me with no alternative other than raise money from other sources.

That notwithstanding the above, I have made every effort within my knowledge and ability to settle the debt in question as a result of which I have so far repaid Kshs 40,000.

That I have, in addition and in a bid to settle the debt, offered for sale my plots at Ongata Rongai ...with the knowledge of the plaintiff.

That my family and I live in that house and I have no other house to shelter them and so would be pleased if the Honourable Court would have mercy on me and therefore grant me an indulgence of a further six

months period within which I have confidence I will have sold the plots in question and obtained necessary funds to liquidate the debt.

33. Clearly, this was an unequivocal admission of debt by the deceased. No issue of repayment of the debt was alluded to, and no challenge was raised against the appellant's claim. Subsequently, and notwithstanding the fact that the appellant obtained a decree for possession in the above suit, a compromise was reached, leading to the recording of a consent order dated 23rd March 2000 in which the appellant agreed to suspend enforcement of the decree on condition that: the deceased pays to the appellant a sum of Kshs 700,000 by close of business on 23rd March 2000; the balance of the purchase price of the suit property in the sale agreement dated 10th August 1999, a sum of Kshs 1.5 million, to be paid to the appellant within 60 days by the deceased; the balance of the outstanding amount to be liquidated by monthly instalments of Kshs 500,000 with effect from 30th April 2000 until payment in full; and in default of any of the terms of the consent the appellant be at liberty to sell the suit property.

34. According to the appellant, this consent was not complied with.

Instead, the deceased filed HCCC No. 649 of 2001 challenging the consent, which suit abated after the death of the deceased. The respondent did not place any evidence before the court to contest this fact. According to the respondent's evidence, by 1995, they had paid almost 2,000,000 which cleared the loan. However, her position could not have been correct because 5 years later, in 2000, the deceased acknowledged that he was in arrears. That the deceased was in arrears was admitted by PW2, who in cross examination stated:

“He did not pay regularly – he was on & off. 1983-85 he did not pay anything...I said the charge document...states interest at 12%...If the 12% was interest rate, then my figure would have changed. I used the percentage in the letter of offer. I used flat rate calculation.”

35. In effect, PW2 admitted that the deceased was not regular in his repayments. Further, and more damning, was his admission that in calculating the rate of interest, he relied on the letter of offer as opposed to the charge, which led him to arrive at the alleged overpayment. Without evidence of the amount, if any, paid post the consent order, one can only conclude that the deceased was behind in his repayments. The learned Judge therefore erred in finding that the facility was repaid in excess of Kshs 1,000,000, which was contrary to the statements of accounts that were produced before the court. Just like in the case of *Ngaira v Chengóli* (supra) and *Joseph Okoth Waudi v National Bank of Kenya* (supra), we find that the deceased had admitted that he was in default, and that there was evidence before the trial court by PW2 admitting the debt, which admission the learned Judge failed to appreciate and hence arrived at the wrong decision. The failure to do so was a misapprehension of evidence entitling us to interfere with the learned Judge's decision.



36. Related to that issue is whether the exercise of the appellant's statutory power of sale had accrued. In *Joseph Okoth Waudi v National Bank of Kenya* (supra), this Court held that as default in servicing of the mortgage had been proved, it could not be rightly said that the respondent had no basis for exercising its statutory power of sale under the charge. In light of our finding that the deceased was admittedly in default, we find that the appellant's exercise of its statutory power of sale had accrued.
37. The third issue is whether the sale of the suit property was lawful. It was contended that the appellant did not issue the statutory notice to the respondent. In her judgement, the learned Judge, after setting out the two versions as presented by the two parties, concluded that:
- “I am therefore satisfied and do believe the plaintiff when she affirms that no statutory notices were served upon her before the sale of the property.”
38. Regrettably, the learned Judge's conclusion failed to meet the test of evaluation which is expected of a trial court. Merely setting out the rival parties' cases and coming to a conclusion without evaluating the respective contentions does not meet the standard expected under Order 21 rule 4 of the Civil Procedure Rules which provides that:
- Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.
39. Rule 5 of the same Order provides that:
- In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.
40. This Court in *Agnes Nzali Muthoka v Insurance Company of East Africa* [2001] 1 EA 143 held that:
- “It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystallise the issues, answer them as fully as possible and eventually hand down a decision.”
41. Nevertheless, this being a first appeal, as we have stated above, we have the duty to re-evaluate and analyse the evidence and arrive at our own conclusions. The respondent's case, on the issue of service, was that despite furnishing the appellant with the new address for service, she was not served with a statutory notice, and that the address that the appellant used was not her correct address. As we stated above, a consent order was recorded between the appellant and the deceased in HCCC No. 693 of 1982. In that consent the parties arrived at a compromise in which the appellant undertook not to enforce the realisation of the suit property if the deceased complied with the terms of the consent. The appellant contended, which contention was not seriously challenged, that the deceased failed to fulfil his side of the bargain, thus paving way for the sale of the suit property. In those circumstances, it is our view that the sale of the suit property was undertaken pursuant to the failure by the deceased to comply with the consensual court order. The respondent cannot, in those circumstances, be heard to complain that the statutory notice was not served.
42. Secondly, by a letter dated 24th August 2007 addressed to the appellant by the respondent's advocates, it was stated that:
- “We are fully aware of the litigation history between yourselves and the late Harrison Charles Kimeriah. We are also aware of your letter dated 26th January, 2006 addressed to our client, which letter purports to claim Kshs 50,607,209.65 as at 31st December, 2005. That letter is



further expressed to be a Statutory Notice. Various attempts have been made since then to obtain a comprehensive statement of account (for the period 12.08.1980 to date) without success.

It is our client's contention that the amount claimed from the estate as reflected in your letter aforesaid is grossly exaggerated and contains unlawful charges, penalties and interest. It is therefore necessary for you to avail the detailed tabulation of all the entries made in the account since its inception to enable our client respond to this claim."

43. It is clear, from the said letter, that receipt of the statutory notice was acknowledged by the respondent, who only contested the amount claimed therein. In our view, where the receipt of the statutory notice is acknowledged, the allegation of non-service of the same becomes a non-issue. This is because the *Evidence Act*, in section 3, defines "fact in issue" as meaning "any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. Under Order 15 rule 1(1) of the Civil Procedure Rules, issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. As service of the statutory notice was admitted, no issue arose in that regard. Had the learned Judge properly analysed the evidence and the pleadings placed before the court, she would no doubt have found that the receipt of the statutory notice, having been acknowledged, was no longer an issue that required proof. Failure to analyse the evidence led to an erroneous finding by the learned Judge and as was held by this Court in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183:

"The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

44. We are satisfied that as regards the service of the statutory notice, the learned Judge failed to consider and analyse the evidence and arrived at the wrong decision.
45. As to whether the appellant breached the terms of the contract between it and the deceased by failing to insure the suit property, we have found that the deceased was not regular in servicing the facility and was admittedly in default. The respondent took the position that the obligation to insure the suit property was on the appellant, notwithstanding default. The learned Judge in finding for the respondent on this issue held that:

"It is however noteworthy that the Defendant never produced a copy of the insurance policy that was taken over the life of the deceased thus the averments contained at paragraph 7(b) of the Defendant's defence that the insurance would only cover the sums upon the death of a party if the account was not in arrears and the borrower paid the same are of no probative value. This Court also notes that the Defendant did not demonstrate how the insurance premiums deducted from the deceased's account were utilized and to which insurance company they were paid. Further, upon the passing of the deceased, the Defendant did not demonstrate that it made a claim for payment of the balance of the loan amount and the insurance company declined to make payments on grounds that there were unpaid dues as at the time of the death of the deceased or any other reason whatsoever."

46. No clause was brought to our attention that imposed an obligation on the appellant to ensure that the suit property was insured notwithstanding default on the part of the deceased. It is clear from



the evidence that the deceased's account was in arrears long before the deceased passed away. The learned Judge's finding that "there was no valid Life Insurance cover in place equivalent to the loan advanced to the deceased at the time of death of the Plaintiff's husband, despite the Defendant having diligently collected the premium thereto" was clearly erroneous. The obligation to ensure that there were sufficient funds in the account to cover both the periodic repayments and the insurance premiums was on the respondent and the deceased. That was the position adopted by this Court in *Housing Finance Company Limited v Mary Wambui Muturi* (supra) where it was held that:

"In our view, the insurance could not be extended to the arrears in future and how much arrears would accrue...the borrower had an equal responsibility to ensure that the premiums were paid, which he did not do. The appellant cannot therefore be burdened with the entire blame in this matter. On the contrary we hold that it would also have been prudent for the borrower to meet his obligations under the contract...as a default in servicing the mortgage had been proved, it cannot be rightly said that the respondent had no basis upon which to exercise its statutory power of sale under the charge...Upon re-considering and re-evaluation of the evidence on record we find that the High Court misdirected itself in assigning the burden to the appellant without putting into consideration the borrower's conduct in the matter."

47. This finding was based on an erroneous finding that the appellant "diligently collected the premiums". Having started on the incorrect premise, we are of similar view that the learned Judge imposed an onerous burden on the appellant to ensure that the suit property was insured notwithstanding the default on the part of the deceased. In doing so, the learned Judge misdirected herself and was in error.
48. On the award of Kshs 150,000,000 to the respondent, the learned Judge, without indicating anywhere in the body of the judgement how she arrived at the said figure, directed that:

The Defendant do pay to the Plaintiff the sum of Kshs.150,000,000/= being the current market value of the suit property together with developments thereon.

49. It is clear that the parties to the suit were not agreed on the value of the suit property. Whereas the appellant's valuation returned a forced sale value of Kshs 8,000,000, the deceased's valuation dated 5th November 1997 returned a value of 21,000,000 and by 28th December 1998, the value was Kshs 28,000,000. In October 2007 the value as given by the respondent's valuer was Kshs 37,000,000. While PW5 testified that in 2007 the market value of the suit property was Kshs.60,000,000 and in 2019 it had risen to Kshs.200,000,000, his evidence was disputed by DW1, who stated that PW5's valuation was based on values at Karen area, whereas the suit property is situated in Langata, a neighbouring area to Karen. The learned Judge was under a duty to evaluate and analyse these conflicting versions and give reasons why she preferred one version as opposed to the other. As it turned out, the learned Judge awarded a figure which was not supported by the evidence on record, but one that was simply pleaded in the plaint.
50. It is our finding that no basis was laid by the learned Judge to justify the award of Kshs 150,000,000. Apart from that, the learned Judge failed to take into account a material fact which was the receipt of Kshs 40,000,000 from the 2nd defendant in respect of the same cause of action. In addition, the award was wrongly based on the alleged value of the suit property at the date of the trial, together with developments as opposed to its value at the time of the sale. The respondent's loss, if any, ought not to have been based on the value of the property as at the date of the trial for the simple reason that such an award may have ended up awarding damages in respect of a property whose value may have increased as a result of factors, such as developments, attributable to third parties. The respondent would only



have been entitled to the value of the suit property as at the time of its sale, less the amount that was due and payable. However, nothing turns on this point in light of our earlier findings.

51. Having considered the submissions made by the parties as well as the record, we find merit in this appeal, which we hereby allow in its entirety. We set aside the judgement of the learned Judge and substitute therefor an order dismissing the respondent's suit with costs to the appellant.
52. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025

D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

